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No. 85-1617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EMERSON ELECTRIC CO.,
Petitioner,
v.
JANET SWENSON,
Respondent.

REPLY BRIEF FOR THE PETITIONER

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The decision of the Minnesota Supreme Court in this case recognizes a new federal tort claim based on failure to comply with interpretive guidelines that the Consumer Product Safety Commission (CPSC) expressly determined would have no binding effect. Respondent contends that, under the Court's decisions, the interpretive guidelines are binding regardless of the CPSC's express declaration to the contrary. She also argues that private damage suits are needed to enforce statutory reporting requirements because "due to monetary restraints the Commission cannot fully perform its job and needs the help of private litigants." And she maintains that the prospect of this new liability will induce such widespread settlement of product liability claims that it will "clear many federal and state court calendars." In all these respects, respondent's Brief In Opposition confirms that the decision below presents an important question of federal law with major consequences for both the judicial system and product liability law generally.

I. THE STATE COURT DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS AND NULLIFIES THE CPSC'S EXPRESS DETERMINATION THAT ITS REPORTING GUIDELINES ARE NOT BINDING

As shown in the Petition, private damage suits under Section 23 of the Consumer Product Safety Act (CPSA) are authorized only for "violations" of a CPSC rule or order (Pet. 2-3). There can be no violation of a rule or order unless it has binding effect. An interpretive guideline that has no binding effect may perhaps qualify as a "rule" but it certainly cannot be violated, and thus cannot give rise to a private cause of action under Section 23 of the Act. The statutory provision that an interpretive guideline construes can of course be violated, but, as the court below recognized, such violations cannot provide the basis for a private damage suit because Congress did not create a private remedy for noncompliance with statutory requirements.

Respondent makes no claim that a Section 23 action could be based on a rule or order that has no binding effect. Nor does she argue that violations of the statutory reporting requirements are themselves actionable under Section 23. Instead, respondent argues that the CPSC's interpretive reporting guidelines are binding because "even if the reporting requirements are considered interpretive, they have the force and effect of law if they reasonably interpret the statute." (Br. in Opp. 7) That attempted defense of the decision below is untenable in two fundamental respects, each of which emphasizes the significance of the federal question presented for review.

First, the claim that the reporting guidelines are binding would, if accepted, nullify the CPSC's express determination that they have no independent legal effect. In promulgating these guidelines, the Commission specifically designated them as "interpretive" and stated that they would not "have the force and effect of law." 43 Fed. Reg. 34,988, 34,990 (1978) (Pet. App. 2f-3f). The agency made clear that an enforcement action could not be based on noncompliance with the guidelines themselves, but only upon violation of Section 15(b) of the Act, which the guidelines seek to interpret.

Respondent's position is that the Commission's express designation of these guidelines as nonbinding should be ignored. The principal basis cited for this extraordinary conclusion is that, before adopting the guidelines, the CPSC provided notice and an opportunity for comment. "If the Commission wished to adopt unenforceable rules only," says respondent, "it need not have published this notice nor requested comment." (Br. in Opp. 9) That is simply not the law. It is well-established that "an agency may, if it wishes, employ notice and comment procedures when proposing interpretive rules without thereby converting them into legislative rules." [1]

Respondent's attempt to disregard the CPSC's determination is not aided by her contention that the CPSA authorizes the promulgation of substantive rules implementing Section 15(b) (Br. in Opp. 9). In fact, the provision that respondent cites—Section 27(e)—provides no basis for regulations implementing Section 15(b) and was not invoked by the Commission for this purpose.[2] But even assuming that the CPSC had authority to adopt substantive rules, it deliberately decided not to do so here. It is well-established that an agency's characterization of its own rules as interpretive should normally be controlling, whether or not the rules could have been promulgated as substantive regulations.[3]

Respondent's claim that the CPSC's determination of the status of its own rules is ineffective and can be disregarded in a private liability suit presents a federal question of considerable significance. If accepted, this contention would leave federal

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[1] Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 17 MINN. L. REV. 955, 968 (1986).

[2] Section 27(e) applies only to manufacturers while Section 15(b) applies to manufacturers, distributors and retailers. Moreover, Section 27(e) calls for the submission of "performance and technical data related to performance and safety," which is a narrower category of information than that called for by Section 15(b). Contrary to respondent's suggestion, the Commission did not invoke Section 27(e) when promulgating 16 C.F.R. Part 1115 and Section 15(b) itself grants the Commission no power to promulgate substantive rules.

[3] K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5.03, at 148-49 (1976); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:16, at 76-78 (1979). *See also* Pet. at 8 n.4.

agencies powerless to adopt nonbinding rules except by foregoing the opportunity for public comment. A state court decision that overrides a federal agency's express decision to adopt nonbinding rules has disturbing implications that merit close review by this Court.

Second, respondent's insistence that interpretive rules can be considered binding if they reasonably interpret the statute is based on a fundamental misreading of this Court's decisions. Respondent confuses the question whether interpretive rules have independent binding effect with the quite different question whether they will be upheld as valid interpretations of the statute. The cases respondent cites go to the latter question, not to the former. For example, the Court's decision in *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 11 (1980), recognizes that an agency's interpretation of the statute it administers is entitled to "deference" from courts charged with determining what the statute means. But neither *Whirlpool* nor any other decision of this Court departs from the fundamental principle that only the statute, not the interpretive rule, carries the force of law. Thus, a holding that an interpretive rule is valid merely means that the agency has correctly interpreted the statute;[4] it does not mean that the rule should receive force and effect apart from the statute it construes.[5]

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[4] For this reason, the CPSC guidelines at issue here would lack independent force and effect even if, as the court below held and respondent asserts, they correctly interpret Section 15(b). In fact, however, the validity of the CPSC regulations is open to serious debate. The validity of the regulations was neither briefed nor argued by the parties below. The regulations are elaborate and detailed, and raise complex issues of statutory construction that the court below did not consider. For example, the term "defect" is not defined in the statute itself, and the Commission's definition arguably departs from well-recognized concepts of "defectiveness" embodied in product liability law. Similarly, the statute does not define the information that firms must report or require the submission of reports in two stages. Yet the Commission's regulations specify the contents of reports in great detail and require the submission of both an initial and follow-up report.

[5] The distinction is unimportant in many cases, but it is of critical importance here, because respondent concedes that the statutory reporting requirements do not give rise to a cause of action; accordingly, there is no private remedy unless the CPSC interpretive rule independently creates one.

This distinction is clearly apparent in respondent's quotation from *Skidmore* v. *Swift & Co.*, which notes that interpretive rules are not "controlling on the courts by reason of their authority" and concludes that such rules have the "power to persuade, if *lacking power to control.*" 323 U.S. 134, 140 (1944) (quoted in Br. in Opp. 7). Similarly, in *Morton v. Ruiz,* the Court contrasted substantive and interpretive rules, emphasizing that only the former can "affect[ ] individual rights and obligations" and therefore are "binding" and have the "force of law." 415 U.S. 199, 232, 235-36 (1974). *See also Chrysler Corp.* v. *Brown,* 441 U.S. 281, 301-02 (1979).

These authorities contradict respondent's claim—and the court's holding below—that interpretive rules can have independent legal effect apart from the statutory provisions they construe. Review by this Court is needed to reaffirm the longstanding distinction between interpretive and substantive rules embodied in the Court's decisions as well as to protect the authority of federal agencies to issue nonbinding rules when they choose to do so.

II. RESPONDENT'S BRIEF CONFIRMS THAT THE DECISION BELOW HAS SIGNIFICANT IMPLICATIONS FOR THE JUDICIAL SYSTEM

Respondent's brief also dramatizes the serious consequences that flow from the Minnesota court's misreading of the CPSA and of this Court's decisions. While denying that no flood of new litigation will result,[6] respondent argues in the next breath that the new cause of action will permit private litigants to do the job of protecting the public that the CPSC allegedly is unable to do, thereby summoning an army of new private attorneys general to enforce CPSC guidelines that the Commission determined were unenforceable.

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[6] In fact, the number of Section 23 cases pending in federal courts is already significant. Based on our informal discussions with manufacturers of gas valves and furnaces, we are aware of over twenty Section 23 cases involving this limited class of products. Many additional cases have been filed involving other types of products. Moreover, Section 23 cases surely will proliferate in the future as evidenced by the number of articles encouraging plaintiff's lawyers to file Section 15(b) suits. *See* Brief of Amici Curiae at 9 n.11 (listing articles promoting the filing of Section 15(b) claims).

Moreover, respondent makes abundantly clear just how significant this new claim really is: "It is believed that this cause of action will assist in the settlement of cases and clear many federal and state court calendars." (Br. in Opp. 12) Where it is difficult to prove that a product was defective, respondent has no doubt that a jury can more readily be persuaded of violations of the CPSC reporting guidelines. And respondent expects the portrayal of such alleged violations as "INTENTIONAL" (*id.* 13) both to influence the jury's view on the merits of product liability claims and to extract more settlements by the threat of punitive damages. These are the very effects predicted by the Petition, and respondent's confirmation of our concerns shows how greatly the cause of actions established by the decision below will exacerbate the crisis in product liability law and the insurance system.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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